

SANTA FE PACIFIC RAILROAD CO.

IBLA 81-811, 81-1072

Decided May 6, 1982

Appeal from decisions of the Arizona and New Mexico State Offices of the Bureau of Land Management designating 20 separate land units as wilderness study areas notwithstanding appellant's ownership of the mineral estate in those lands.

Reversed and remanded.

1. Administrative Authority: Generally -- Constitutional Law: Generally -- Federal Land Policy and Management Act of 1976: Wilderness -- Mineral Lands: Generally -- Mines and Mining -- Regulations: Applicability -- Secretary of the Interior -- Wilderness Act

Where the entire mineral estate underlying all or a portion of several wilderness inventory units, with the attendant rights of entry, access, occupation, exploration, development, and improvement of the surface, is owned in fee simple by a private corporation, the mineral estate is a "vested right" as distinguished in public law terminology from a "valid existing right" and, being protected by Constitutional guarantees, is immune from denial or extinguishment by the exercise of Secretarial discretion or regulation. It is legally beyond the authority of the Secretary to fulfill the mandates of the Federal Land Policy and Management Act of 1976 and the Wilderness Act to manage such lands for their protection and preservation as wilderness, and the inclusion of such lands in designated wilderness study areas is error.

APPEARANCES: Gus Svolos, Esq., and Ann L. Straw, Esq., Chicago, Illinois, for appellant; Barbara I. Berschler, Esq., Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

These appeals, consolidated at the motion of the appellant, Santa Fe Pacific Railroad Company, are taken from the decisions of the Bureau of Land Management (BLM) denying the company's protests against BLM's designation of 16 land inventory units in Arizona and 4 land inventory units in New Mexico as wilderness study areas (WSA's) pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976). (See Appendix.)

Appellant's principal contention is that it is the owner in fee simple of the entire mineral estate underlying all or a portion of the subject wilderness inventory units, with the attendant rights of access, entry, occupation, exploration, and development. These rights, it argues, may not be curtailed or diminished by or through the management constraints which BLM is committed to impose upon designation of these inventory units as WSA's. We agree, as will be discussed below.

Appellant also appeals the propriety of WSA designation of these units on the basis that they do not qualify for designation because they fail to meet the criteria requiring outstanding opportunity for solitude, substantially unnoticeable imprints of man's work, etc. In view of our holding with respect to the principal contention, supra, we find it unnecessary to address these assertions.

Finally, appellant's statement of reasons in IBLA 81-811 lists 10 additional units in Arizona which have also been designated as WSA's, to which appellant says its appeal should apply with equal force although these units "were inadvertently omitted from [appellant's] December 11, 1980 Protest." (See Appendix.) The record shows that not only were these units omitted from appellant's protest, but also were not listed in its notice of appeal. We have held that in such circumstances the jurisdiction of the Board is not established, requiring that a tardy appeal be dismissed. San Juan County Commission, 61 IBLA 99 (1982); Conoco, Inc., 61 IBLA 23, 25 n.1 (1981); C&K Petroleum Co., 59 IBLA 301, 302 n.1 (1981). Accordingly, the Board may not disturb the decisions to designate these 10 units as WSA's. We will note, however, that such designations do not invest BLM with any enhanced authority to limit, curtail, or control appellant's lawful enjoyment of its property rights in the designated lands.

Neither appellant nor BLM has undertaken to identify or quantify the lands in each unit in which the severed mineral estate is owned by appellant. 1/ Nor has this Board been provided with copies or exemplars of the

1/ The magnitude of such an undertaking is illustrated by the following statement excerpted from appellant's commentary to BLM's Arizona State Director: "Santa Fe Pacific is currently involved in Phase I of a three-part exploration and development program on its 1.6 million acres of mineral fee in Mohave and Yuma Counties."

instruments of conveyance or grant by which the mineral estate was severed from the surface estate and title thereto invested in or reserved by appellant. Therefore, this opinion must be dependent on our assumption that appellant's allegations concerning the nature and extent of its interest in the lands comprising the subject units are true.

[1] When the mineral estate is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct titles, and each is a freehold estate. An exception of minerals in a grant of land with a reservation to enter and remove them is valid and not contrary to public policy. A grantee of minerals underlying the land becomes the owner of them; his interest is not a mere mining privilege. Their ownership is attended with all the attributes and incidents peculiar to ownership of land. A grantee of the land other than the minerals, or with the minerals reserved or excepted from the grant, gets title to all of the surface and that part of the subsoil which contains no minerals, and the grantor has a fee simple in the minerals retained by him. 54 Am. Jur. 2d, Mines and Minerals §§ 108, 116 (1971). The owner of the mineral estate has, either by the express terms of the conveyance or by necessary implication therefrom, a right of entry or access to the minerals over or through the surface. See Ross Coal Co. v. Cole, 249 F.2d 600 (4th Cir. 1957). Further, as stated in 54 Am. Jur. 2d, Mines and Minerals § 210 (1971):

The right to minerals when separated by grant or reservation in a deed is as much an estate in lands as the right to the surface of the same lands, and unless the language of the conveyance by which the minerals are acquired repels such construction, the mineral estate carries with it the right to use as much of the surface as may be reasonably necessary to reach and remove the minerals. The right to enter the mineral estate from the surface, which is implied by a deed severing the estate in the mineral from the estate in the surface, is not excluded by the specific reservation in the conveyance of (1) a right of subsidence without damage, (2) the use of passageways and entries to move coal from other lands, and (3) the right to take surface land for other mining purposes at a certain price, the rights so enumerated being in excess of any rights of entry implied by law.

In accordance with the maxim that when anything is granted all of the means of obtaining it and all of the fruits and effects of it are also granted, it has been held that where a mineral deed expressly confers upon the grantee the right to use the surface in any manner that might be deemed necessary and convenient for mining, the grantee has the right to adopt the strip and auger method of coal mining without incurring liability for damages to the surface. [Footnotes omitted.]

The extent of the rights enjoyed by the owner of the mineral estate vis-a-vis the owner of the surface estate are expressed with additional particularity in the following excerpts from 58 C.J.S. Mines and Minerals § 159 (1948):

Surface rights incident to mining may be expressly granted in the conveyance of the mineral rights, and, as considered infra subdivision b of this section, even in the absence of an express grant the law implies a grant of certain surface rights. * * * The incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary exists in the case of a reservation of mineral rights as well as a grant.

* * * * *

Where the grant confers on the mineral owner the use of the surface of the land in the prosecution of its business for any purpose of necessity or convenience, the grantee is the judge of the necessity or convenience and, as long as he does not use his power arbitrarily, oppressively, or maliciously, he cannot be held liable in damages to the owner of the surface. Under such a grant the grantee may, where it is necessary or convenient to do so, use and occupy the whole surface of the land, even to excluding the surface owner and taking his house and garden by making compensation therefor.

* * * * *

Particular rights or privileges. In accordance with this general rule an owner of minerals may sink shafts or construct drifts or wells through the surface for the purpose of exploring and opening a way to his underlying minerals; remove or use so much of the containing strata, above and below, as may be reasonably required for the proper mining of the mineral; construct drains and tunnels; construct such roads, passways, or means of ingress and egress as may be necessary to get at and remove the minerals; use such amount of water from the land as is reasonably necessary to develop the mineral rights; construct a tramroad from the mine to be used in connection with the mining operations, if fairly necessary; erect and maintain a tippie; and generally employ all reasonable means and necessary appliances requisite to the proper working of the mine or minerals, except that where the right, granted or reserved, is to mine in a specified manner it does not give the right to mine in a different manner. [Footnotes omitted.]

In many cases, courts have construed grants or reservations of mineral estates as investing the mineral owner with the right to destroy the surface. See, e.g., Peabody Coal Co. v. Pasco, 452 F.2d 1126 (6th Cir. 1971).

As related above, the owner of mineral rights is entitled to take from the land and use that amount of water which is reasonably necessary for the exploitation of the mineral rights. Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956), cert. denied, 354 U.S. 938 (1957).

The right of the owner of the mineral estate to enter, traverse, occupy, and utilize the surface, even where such right is merely implied, has been held to be in the nature of an easement wherein the mineral estate is dominant and the surface estate is servient. Cole v. Ross Coal Co., 150 F. Supp. 808 (D.S.D. W.Va.), aff'd, 249 F.2d 600 (4th Cir. 1957); Davis v. Mann, 234 F.2d 553, 559 (10th Cir. 1956). A "dominant estate" has been defined as the property right situated above or higher than that of a lower or subservient estate. Walther v. City of Cape Girardeau, 149 S.W. 36, 38 (C.A. Mo. 1912). The "servient estate" is the one on which the easement is imposed and upon which the obligation rests, while the "dominant estate" is the one to which the right belongs. See definitions collected in Words and Phrases, "Dominant," "Servient."

Of course, the owner of the mineral estate owes certain duties to the surface owner as well, such as the duty not to commit waste and to refrain from unreasonable interference with the surface owner's right of enjoyment of his property. However, it is clear from the foregoing discussion that, as a general proposition, the surface estate is relegated to the inferior status, and is subject to the exercise of dominion by the owner of the mineral estate to some extent. The measurement of the extent to which the mineral owner can utilize the surface must be adjudicated on a case-by-case basis, and is dependent upon such considerations as the language employed in the severance of the estates, the intentions of the parties to such severance, mining customs and technology at that time and place, etc. But such concerns are limited to the determination of whether the claimant to the mineral right is the actual owner and, if so, the extent to which he may utilize the surface. Our research discloses no case in which the acknowledged owner in fee simple of the mineral estate could be controlled by the surface owner in the former's reasonable exercise of the full extent of the rights arising from his mineral ownership.

It goes almost without saying that ownership in fee simple of a mineral estate is a property right which is protected by Constitutional guarantees, including the Fifth and Fourteenth Amendments thereto.

Appellant contends that by designating lands to which it owns the mineral title as WSA's, BLM has violated the provision of FLPMA which reads, "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." P.L. 94-579, section 701(h); 43 U.S.C. § 1701 note (1976). Appellant argues

[S]uch a designation implicitly restricts Santa Fe Pacific's valid existing right to explore and develop minerals it owns in fee thus making those rights subject to action taken under FLPMA, instead of following the Congressional mandate that BLM's actions under FLPMA must be subject to Santa Fe Pacific's valid, existing rights.

The implication that appellant's rights might be subject to attempts by BLM to restrict them had a stronger basis when these units were designated as

WSA's and when these appeals were filed, than it does now. At that time, the Department's policy and management program for the implementation of its wilderness study obligations were guided by and based upon Solicitor's Opinion, M-36910, 86 I.D. 89 (1978), which interpreted FLPMA as giving the Department broad authority to impose "nonimpairment" restraints even in the exercise of certain "valid existing rights." However, that opinion has since been modified by Solicitor Coldiron's opinion of October 5, 1981, M-36910 (Supp.), 88 I.D. 909 (1981), captioned "The BLM Wilderness Review and Valid Existing Rights," wherein the Solicitor explains that the term "valid existing rights," as employed in public land law terminology, refers to inchoate rights arising under a statute; e.g., an unpatented mining claim, or to rights created as the result of an exercise of Secretarial discretion, such as a mineral lease. "Valid existing rights," in that context, are distinguished from and inferior to "vested rights," which term connotes that legal or equitable title has passed to a non-Federal owner. Specifically, Solicitor Coldiron's opinion states:

III. VALID EXISTING RIGHTS

Although the legislative history is largely silent on the scope of this term, 2/ it is not unique to FLPMA. The term has an extensive history both in the Department and the courts.

In defining "valid existing rights," the Department distinguishes three terms: "vested rights," "valid existing rights," and "applications" or "proposals." 3/ "Valid existing rights" are distinguished from "applications" because such rights are independent of any secretarial discretion. They are property interests rather than mere expectancies. Compare Schraier v. Hickel, 419 F.2d 663, 666-67 (D.C. Cir. 1969) and George J. Propp, 56 I.D. 347, 351 (1938) with Udall v. Tallman, 380 U.S. 1, 20 (1965), United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420 (1931), and Albert A. Howe, 26 I.B.L.A. 386, 387 (1976). "Valid existing rights" are distinguished from "vested rights" by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title have been satisfied. 4/ Compare Stockley v. United States, 260 U.S. 532, 544 (1923) with Wyoming v. United States, 255 U.S. 489, 501-02 (1921) and Wirth v. Branson, 98 U.S. 118, 121 (1878). Thus, "valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion.

2/ [omitted.]

3/ Each of these terms applies only to third parties. They do not apply to interests of federal agencies, departments, or agents. See, e.g., Townsite of Liberty, 40 I.B.L.A. 317, 319 (1979).

4/ "Vested rights" has a narrower meaning within public land law terminology than in other areas of the law. In public land law, "vested rights" typically applies to legal or equitable rights to

a fee title. See e.g., Wyoming v. United States, supra at 501-02. Oil and gas leases, which do not convey fee title, have not been couched in terms of the traditional "vested right" usage.

Id. at 911-12.

Applying these definitions, it is beyond cavil that ownership of the severed mineral estate in fee simple constitutes a "vested right" which is "immune from denial or extinguishment by the exercise of secretarial discretion," rather than a "valid existing right" which may be subject to Federal restraints to enforce the "nonimpairment standard" established by section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), and conditioned by the "valid existing rights" clause at section 701(h) of FLPMA, supra.

Having established the nature of the relationship between the private mineral estate and the Federal surface estate, we must now consider whether to sustain the decisions designating as WSA's those units which are comprised of lands wherein the mineral estate is owned by appellant. The sole and exclusive basis on which those decisions might be sustained is by a rigid and irrational adherence to the definition of "public lands" provided at section 103(e) of FLPMA, 43 U.S.C. § 1702(e) (1976), which states:

(e) The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except --

(1) lands located on the Outer Continental Shelf; and

(2) lands held for the benefit of Indians, Aleuts, and Eskimos.

Five hundred sections beyond that definition, 2/ at section 603, FLPMA requires that BLM conduct a wilderness study with the following language:

Sec. 603. (a) Within fifteen years after the date of approval of this Act, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 201(a) of this Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) * * *. [Emphasis added.]

2/ It should be borne in mind that FLPMA is an extremely broad and comprehensive statute, dealing not only with the essential organization of BLM, but with its authority and jurisdiction across the entire range of the myriad Federal interests in land. Thus, the definition of "public lands" at section 103 was, of necessity, contrived so as to be sufficiently encompassing as to reach and include all such interests.

By strict and unsensible application of the Act's definition of "public lands" to the foregoing quotation, it would appear that any land in which the United States held any interest at all which was administered by BLM and which met the other wilderness criteria (except land at the bottom of the sea and land held for the benefit of Native Americans) would, perforce, have to be designated a WSA. However, this Department has never applied that definition with such blind, unreasoning conformity in its wilderness review program. Specifically, in addition to the two exceptions identified by the statute, three other exceptions have been expressly carved out of the section 103 definition for the purpose of the wilderness review program. These are:

- a. Lands where the United States owns the minerals but the surface is not Federally owned.
- b. Lands tentatively approved for State selection in Alaska.
- c. Oregon and California grant (O&C) lands that are managed for commercial timber production.

Interim Management Policy and Guidelines for Lands Under Wilderness Review (Appendix F, "Definitions"), December 12, 1979.

Obviously, the above categories of land were eliminated from the wilderness review program on recognition that it is legally beyond the authority of the Secretary to fulfill the mandate of FLPMA, section 603(c), *supra*, and the Wilderness Act, 16 U.S.C. § 1131(a) (1976), that he "shall continue to manage such lands * * * in a manner so as not to impair the suitability of such areas for preservation as wilderness" (FLPMA), and that "these shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character * * *" (Wilderness Act).

Similarly, the lands here at issue are so encumbered by "vested rights," including a dominant right of use of the Federally owned surface, as to put them beyond the legal authority of the Secretary to manage for their protection and preservation as wilderness. The fee simple mineral estate owned by appellant, and the attendant rights to use the surface, are unquestionably "immune from denial or extinguishment by the exercise of secretarial discretion." To designate such lands as WSA's and to engage in formal studies of them to ascertain whether they are susceptible to management as a permanent part of the wilderness system is to engage in futile and pointless exercises with preordained negative results, akin to commissioning a study of water to determine if it is dry.

We conclude that where the Secretary lacks the legal authority to manage lands for their protection and preservation as part of the permanent wilderness system, such lands should be excluded from the wilderness review process.

The dissenting opinion equates the ownership of unpatented mining claims with ownership of the mineral fee and concludes that both are "valid existing rights." Noting that the presence of an unpatented mining claim does not require exclusion of the land from a WSA, the dissent, in effect, asks "Why should private mineral fee land be excluded?" There are three reasons. First, until the validity of an unpatented claim is ascertained, it is uncertain that the owner has any rights at all. Thus, the land is an appropriate subject for further study. No such uncertainty exists with respect to private mineral fee lands in which the owner's rights are vested. Second, an unpatented mining claim is still subject to certain discretionary controls by the Department, such as with respect to access routes, mining plan approval, use of timber on the site (free timber may be made available from off the claim site, 30 U.S.C. § 612 (1976)), etc. Here, the surface estate is subservient to the mineral estate. Finally, in this case, the areas of outstanding mineral fee are so extensive, allegedly involving great portions -- or even all -- of the WSA's concerned, that the area legally beyond the capacity of the Department to control and protect is vastly greater than the areas occupied by an unpatented claim or group of claims of undetermined validity. The fact that unpatented claims "may totally pass from Federal ownership, and thus would be free of all possibilities of management controls" (dissent), augers in favor of further study, not against it, so that a proper judgment might be made concerning whether the Secretary does or does not have the legal right to protect and preserve the land.

The dissent also argues that the private mineral fee lands should be included in the WSA's so that the Department might study the nature and extent of any mineralization present. But any findings made in this regard by the Department would not be binding on the owner, who would be at liberty to explore at will by any reasonably appropriate method, and probably in such a way as would involve more damage (and elicit more information), than the exploration methods used by the Department, which would be restrained from removing vegetation, cutting brush and trees, making excavations, utilizing explosives and mechanized equipment, stripping overburden, drilling cores and/or wells, etc. After all, the Department's study of the mineralization owned outright by a private entity could hardly be accomplished by any method that would damage the wilderness values that both FLPMA and the Wilderness Act require the Secretary to protect and preserve. But the private owner of the minerals is under no such legal restraint. Therefore, the Department's study of the privately owned mineral estate would necessarily be cursory, inconclusive, for its own information only, and of no consequence to the owner of the mineral estate.

The dissenting opinion points to the Information Memorandum issued by the BLM Director on April 22, 1982 (while this opinion was in preparation). The memorandum, entitled "Application of the Manageability Criterion in Wilderness Studies," serves to establish, with emphasis, that one of the most critical objects in conducting formal studies of a potential wilderness area is to ascertain whether the lands included in the study area are susceptible of being managed under authority of law by this Department for the protection and preservation of such wilderness values as may be present. Where it is known in advance that they cannot be, to ignore that knowledge and include

such lands in WSA's to be studied anyway for the sake of form, would be wasteful and grossly irresponsible.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions denying appellant's protests are reversed, the decisions designating the subject inventory units as WSA's are set aside, and the records are remanded to the respective BLM State Offices for the elimination of all lands encumbered by appellant's vested rights in the mineral estate from the several inventory units, and for a redetermination of whether the lands remaining in such units thereafter should be designated as WSA's.

Edward W. Stuebing
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI DISSENTING:

This case presents an issue of first impression before the Board, *i.e.*, does the existence of a reserved mineral interest held by private parties in lands where the surface ownership is in the United States preclude the inclusion of such land in a wilderness study area (WSA) established under section 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976). The majority effectively answers this question in the affirmative. For reasons set forth below, I respectfully dissent.

One of the major difficulties in this appeal is the total absence of copies of the conveyances which served to sever the mineral from the surface estate. While I recognize that the mineral estate may be termed the "dominant estate," the recent trend of court pronouncements clearly underline the fact that such dominance is not absolute. *See generally* J. Lacy, "Conflicting Surface Interests: Shotgun Diplomacy Revisited," 22 Rocky Mt. Min. Law Inst. 731, 734-48 (1976). The litigation surrounding the determination as to the "dominant" and "servient" estates has generally focused on the specific language found in the documents creating the two estates.

Thus, in *Dubois v. Jacobs*, 551 S.W.2d 147 (Tex. Civ. App. 1977), reservation of an "interest in and to all the oil, gas and other minerals in and under, and that may be produced from" the land was held by the court not to include an interest in any mineral substance "that must be produced in such manner as to destroy, deplete, consume, or substantially impair the surface." *Id.* at 150. Similarly, the reserved right to use the surface has been held to not necessarily reserve the right to destroy the surface. *Smith v. Moore*, 474 P.2d 794 (Colo. 1970). *See also Acker v. Guinn*, 464 S.W.2d 348, 352 (Tex. 1971).

The implied rights of entry and development are based on the logical assumption that the mineral estate was reserved for the purpose of retaining the rights to develop the mineral in the conveyor. It is part of the bargain between the grantee and the party who originally determines to reserve the mineral estate. The nature and extent of the rights retained, however, must necessarily find their basis in the documents establishing the severance of the mineral from the surface estate. The rights attendant to the "dominant" estate could, thus, be more expansive or more limited depending upon the agreement of the parties. Indeed, a reserved mineral estate could be so circumscribed by conditions and qualifications as to belie its "dominant" appellation. Since implied rights exist only to effectuate the intent of the parties as manifested in the conveyance, where the intent is limited, so too are any "implied" rights.

I mention these principles not because I think that they automatically apply so as to limit appellant's reserved mineral interest, but rather to point out that in the absence of relevant documentation it is impossible to ascertain the scope of appellant's rights, express or implied, and the extent to which their exercise might diminish or destroy the wilderness characteristics of the land. While the majority agrees that the holder of the dominant estate must exercise his rights in a reasonable manner, any

specific reservation might further qualify the exercise of such rights as are clearly granted. 1/ The majority's blanket approach in prohibiting the inclusion of such lands in WSA's, particularly in the absence of any of the relevant documents, is essentially adjudication by speculation. 2/ Moreover, even if one were to assume, arguendo, that the reservations of minerals were couched in terms so broad as to brook no limitation, I would submit that the majority decision is still in error.

A reservation of the mineral estate is of efficacy only when there are minerals within the land conveyed. Where there are no such minerals, a reservation of such an estate essentially reserves nothing. Nor does the mere fact the minerals were reserved in a conveyance serve to establish that minerals exist. 3/ The existence or nonexistence of valuable minerals in the lands involved herein is also clearly speculative.

Admittedly, under the assumption of the majority, appellant would have an absolute right to prospect for such valuable minerals and develop any such mineral found. Thus, the majority argues, the potential exists for the complete destruction of the wilderness values which the Secretary is mandated to protect. Because of this, the majority concludes the Secretary should not study the area under section 603(a) of FLPMA. The conclusion, however, does not flow from the premise.

First, while the majority does attempt to distinguish between an unpatented mining claim (a "valid existing right") and a reserved mineral interest (a "vested right"), I think it is a distinction without a difference. It has long been settled law that an unpatented mining claim, supported by a discovery of a valuable mineral deposit, is "property in the fullest sense of the word." Forbes v. Gracey, 94 U.S. 762 (1877). Admittedly, an unpatented valid claim could become invalid because of a failure to continue compliance with

1/ As an example, a purchaser could agree to allow the reservation of all oil and gas underneath a tract of land but, at the same time, have the document expressly exclude any right in the holder of the retained mineral interest to drill or otherwise enter upon the conveyed land.

2/ It would seem clear that the burden of producing these documents should be on appellant since not only is it the proponent that the land should be excluded but it was the party that created the severed estates to begin with.

3/ Not only would the existence of valuable minerals in all lands which appellant alleges it holds a reserved mineral estate (1.6 million in Yuma and Mohave Counties alone) seem spectacularly unlikely, I would also note that the lands which were originally granted by the Government to the railroad were required to be nonmineral under the terms of the grant. See, e.g., section 3, Act of July 27, 1866, 14 Stat. 292, 294. It is true that the mineral character of the land was to be ascertained as of the time of patent (Barden v. Northern Pacific Railroad Co., 154 U.S. 288, 329-32 (1894)), and thus, the determination would certainly not be preclusive of the present existence of valuable minerals. Nonetheless, it hardly seems credible that all 1.6 million acres which Santa Fe (and its predecessor, Atlantic and Pacific Railroad) obtained on the theory that the lands were nonmineral, were, in fact, mineral.

the law or through a loss of discovery. But, so long as compliance is maintained and discovery continues, interference with the vested right of a mining claimant is a compensable taking. ^{4/}

I fail to see how these rights of a mining claimant are, in any relevant way, inferior to the "vested" rights involved therein. And if they are not, the analysis of the majority must ineluctably lead to the conclusion that valid mining claims should not be included in a WSA. This conclusion, however, is directly contrary to the Solicitor's Opinion, 88 I.D. 909 (1981), upon which the majority relies to establish its dichotomy. Such a result also expressly contradicts the language of section 4(d)(3) of the Wilderness Act, Act of September 3, 1964, 78 Stat. 893, 16 U.S.C. § 1133(d)(3) (1976), and ignores, as well, the language of section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976). Finally, the holding herein is manifestly in conflict with policy guidelines issued by the Director, BLM. See Information Memorandum No. 82-176, April 22, 1982.

Solicitor Coldiron's opinion expressly stated that "'valid existing rights' are distinguished from 'vested rights' by degree." 88 I.D. at 912 (emphasis supplied). The opinion then goes on to note that the nonimpairment standard would not be applied to prior valid mining claims if to do so would be to "unreasonably interfere with enjoyment of the benefit of the right." Id. at 913. The standard, thus, is one of reasonableness which, I would suggest, is the same standard applicable to the exercise of appellant's reserved mineral rights. Solicitor Coldiron did not say, however, that the mere fact that the holder of a valid mining claim has the right to develop it, should he so desire, precludes inclusion of such land in a WSA. And neither did Solicitor Coldiron even suggest that because a claimant has the right to develop and the exercise of that right might impair wilderness characteristics, the Secretary should not study the land under section 603.

The majority herein basically holds that because the Secretary may not be able to prevent destruction of the wilderness characteristics by appellant, he therefore should not include the land in a wilderness study area under section 603(a). The Solicitor, in essence, holds that even though the Secretary may not be able to prevent destruction of the wilderness characteristics by mining claimants, such lands may be included in WSA's. These two positions are, I submit, fundamentally irreconcilable.

Moreover, lands within established wilderness areas are, at this moment, open to mineral prospecting and location. See 16 U.S.C. § 1133(d)(2) and (3) (1976). It is true that prospecting and the development of claims located after the date of the Wilderness Act are subject to substantial control, and patents for such claims convey the mineral deposit with only certain rights

^{4/} Thus, the only real difference between a valid existing right and a vested right would seem to be that the holder of a valid existing right might be divested of that right in the future by the occurrence of certain events. As a matter of present adjudication, however, a valid existing right is, in every way, equal to a vested right.

to the surface estate. But claims located prior to the Wilderness Act are expressly protected, even though included in a wilderness unit, and these claims may go to patent, which patent would embrace the surface estate. Since Congress has, therefore, clearly countenanced the inclusion in the wilderness system of land in which both the surface and mineral estates may totally pass from Federal ownership, and thus would be free of all possibilities of management controls, I can find no support for the majority's conclusion that the Secretary should refrain from even studying land where he might not be able to prevent destruction of wilderness characteristics.

Then, too, section 603(c) of FLPMA, 43 U.S.C. § 1782 (1976), which contains the nonimpairment management directive, expressly makes the requirement subject to the continuation of existing mining uses. If Congress had not contemplated that such uses might be inimical to the nonimpairment standard there would have been no reason to provide this exception.

Finally, I think it clear that the majority decision directly contravenes the recent Information Memorandum, entitled "Application of the Manageability Criterion in Wilderness Studies," issued by the Director, BLM, on April 22, 1982. That memorandum noted that "[m]anageability was not a factor considered during the inventory phase." *Id.* at 3. It is clear that the majority rejects this premise. But even more on point is the discussion of mining and mineral leasing as they affect manageability. Thus, the Director noted:

Mining and mineral leasing are allowed in wilderness areas before the area is withdrawn, and on claims having valid existing rights after withdrawal. The Wilderness Act allows these activities to occur, and to recommend a WSA as unsuitable based solely on assumptions and speculation about future impacts on an area's wilderness character is clearly against the intent of the Act. Management as wilderness over the long term is BLM's goal. Based on existing knowledge of the resources and on present uses in an adjacent to the WSA, can the area be managed as wilderness? If the uses allowed by the Wilderness Act would in the long term destroy the area's wilderness character, then the conclusion would be to not recommend that portion or the entire WSA. A suitable recommendation would be made where it was determined such activities would not preclude effective management as wilderness over the long term.

Even though a WSA may contain mining claims or oil and gas leases, this should not of itself preclude a suitable wilderness recommendation. The probability of those leases progressing to development stage and claims having a valid discovery prior to withdrawal must be determined and documented in the wilderness study. This is done by assessing the resource data available; consulting with staff minerals examiners and geologists; Geology, Energy, and Minerals (GEM) reports; and evaluating present uses within and adjacent to the WSA. Suitable recommendations can be

changed if at a later date the mineral survey report shows a high potential for minerals. [Emphasis supplied.]

Id. at 4.

The majority decision does not purport to delineate those areas where the mineral reservation might, indeed, eventually lead to impairment of wilderness characteristics. On the contrary, by prohibiting the inclusion of these areas in WSA's, the decision actually destroys the very mechanism, the study phase, which might permit BLM to determine the real likelihood of development as it relates to any specific area. I can find no basis for the holding of the majority that where the Secretary's power to prevent possible impairment of wilderness characteristics is lacking, he cannot study an area to ascertain the likelihood of the impairment occurring.

I also disagree with the majority's statement that "to designate such lands as WSA's and to engage in formal studies of them to ascertain whether they are susceptible to management as a permanent part of the wilderness system is to engage in futile and pointless exercises with predetermined negative results, akin to commissioning a study of water to determine if it is dry."

The purpose of the study phase is to enable BLM to

analyze each WSA's suitability for wilderness designation in conjunction with the whole range of other public land uses that Congress has authorized. Thus, the mineral potential of any tract would be examined in the study phase to determine the impact that a permanent wilderness designation might have on such values. Moreover, this analysis is not limited to only mineral values, but embraces the full range of public uses, including grazing and recreational use, with an aim to determining the relative merits of a specific parcel's inclusion in the wilderness system. Indeed, the entire purpose of the study phase is the generation of data sufficient to make informed choices between competing claims to the land.

Union Oil Co. (On Reconsideration), 58 IBLA 166, 170 (1981).

Intrinsic to this process must be the realization that certain designated WSA's will be determined to be nonsuitable because of the presence of other values. Then, too, development of a mining claim within a WSA may, during the study phase, destroy the wilderness characteristics of the WSA and result in a negative recommendation. ^{5/} On the other hand, the analysis may show great wilderness potential and little or no conflicting value for other uses including mineral development, even where mining claims, arguably valid,

^{5/} This Board has already recognized that valid mining claims which are included within WSA's, may be developed even if development impairs wilderness characteristics. See Havlah Group, 60 IBLA 349, 88 I.D. 115 (1981).

exist. The Wilderness Management Policy, published September 24, 1981, makes express reference to the acquisition, by negotiation or condemnation, of non-Federal land within wilderness areas. Id. at page 12. Congress could, in such instances, expressly direct acquisition of reserved mineral interests, as well.

Designation of the parcels of land before us as WSA's could serve a useful purpose of isolating truly outstanding wilderness areas, worthy of preservation, with limited or no mineral values, with an eye toward acquiring the reserved mineral estate through either negotiation or eminent domain. If, during the study phase, various activities of appellant render a WSA no longer suitable for designation, so be it. This possibility is no different in kind or scope than that which attends the study of any other WSA where valid existing rights exist. The majority's decision, however, effectively limits the authority of the Secretary, not to affect appellant's rights since they would not be limited in a WSA, but to prevent wilderness impairment by other entities. 6/ I think this is wrong.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Bruce R. Harris
Administrative Judge

6/ In this regard, I would note that it is difficult to ascertain how appellant can allege injury in this appeal. If WSA designation does not impede exercise of its right, I cannot see how appellant has standing to challenge this designation before the Board. See 43 CFR 4.410.

APPENDIX

IBLA 81-811

Arizona Units Timely Protested and Appealed

	1-96C	2-14
	1-97	2-15
	1-104A	2-24
1-104B	2-28/29	
2-08	5-7C/5-48/2-52	
2-09	5-12	
2-10	5-13	
2-12/42	5-15A	

IBLA 81-1072

New Mexico Units Timely Protested and Appealed

	NM-020-007	NM-020-009
NM-020-008	NM-020-010	

Arizona Units Not Protested Nor Listed in Notice of Appeal (Not considered)

1-105B
 1-105C
 2-37/43
 2-53
 2-54
 2-56
 2-58
 2-59
 2-62
 5-7B

